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No. 94-227

In The
Supreme Court of the United States
October Term, 1994

S-1 AND S-2, *et al.*,
Petitioners,

v.

STATE BOARD OF EDUCATION OF
NORTH CAROLINA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners qualified as prevailing parties entitled to attorney's fees on the theory that their dismissed lawsuit had continuing catalytic force and was the cause of post-dismissal events which were of no direct benefit to them?

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's *en banc* opinion in this case. That opinion is reported at 21 F.3d 49 (1994).

STATEMENT OF THE CASE

This unusual case has a long and complex history. In the beginning, the issue in controversy was whether in enacting the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, Congress intended to

require the states to vest final administrative authority to order reimbursement for private school costs in administrative hearing officers and, if so, whether Congress had that power. That issue was never resolved; it was declared moot by the Court of Appeals in November, 1987. *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987). Now, the issue is whether petitioners, who never obtained an enforceable judgment, consent order or settlement agreement, are nevertheless prevailing parties entitled to attorney's fees based on a letter written to the State of Vermont by the Office of Special Education and Rehabilitation Services (OSERS) in the United States Department of Education (USDOE) or based on post-mootness legislation enacted by the North Carolina General Assembly.

The events upon which petitioners claim prevailing party status are best described chronologically.

Todd and Lisa Y. enrolled in public schools operated by the Asheboro City Board of Education in August, 1979. They remained enrolled in the public schools on a full-time basis through the 1980-81, 1981-82, and 1982-83 school years. For the 1983-84 school year, Todd and Lisa were enrolled half-time in the public schools and half-time in a private school. The private school costs were paid by their parents. Following the 1983-84 school year Todd and Lisa's parents re-enrolled their children full-time in the public schools but demanded that the Asheboro City Board of Education reimburse them for the costs they had incurred by enrolling Todd and Lisa half-time in private school. The Asheboro City Board of Education rejected the parents'

demand and pursuant to state law then in effect appointed a hearing officer, C.D. Heidgerd, to consider the parents' demand. Mr. Heidgerd advised the parents that he did not have the power to grant them the relief they demanded, that is, reimbursement for the private school costs they had incurred.

On March 28, 1985, Todd and Lisa's parents petitioned the State Board of Education to amend or interpret its rules to grant hearing officers the power to order local school boards to reimburse the parents of handicapped children for private school costs. The State Board initially declined the parents' request on the grounds that the legal question underlying their request, whether the IDEA requires school systems to reimburse parents for private school costs, was pending in the United States Supreme Court for decision. On April 29, 1985, in *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985), this Court held that the right to a free, appropriate education, under some circumstances, encompasses the right to reimbursement for private school costs and that 20 U.S.C. § 1415(e)(2) gives the courts the power to order reimbursement. The issue of whether the IDEA requires the states to confer that power on hearing officers, however, was not addressed.

On May 1, 1985, Todd and Lisa's parents renewed their request to the State Board to amend or interpret its rules to confer on hearing officers the power to order local school boards to reimburse parents for private school costs. On June 5, 1985, the State Board denied their request on three grounds: (1) that State law did not authorize hearing officers

to order the payment of damages in the form of reimbursement and the federal law did not require that hearing officers have that power; (2) that any power the State Board itself might have to order judicial or quasi-judicial remedies, like reimbursement, could not be delegated to a hearing officer absent legislative authorization; and (3) that as a matter of public policy it ought not confer on hearing officers over whom it had no control the power to order the expenditure of public funds.

On August 2, 1985, Todd and Lisa Y. (as S-1 and S-2) by and through their parents (as P-1 and P-2) (hereinafter "petitioners") sued the Asheboro City Board of Education for reimbursement of the private school costs they had incurred during the 1983-84 school year and sued the State Board of Education to enjoin it to confer the power on hearing officers to order local school boards to reimburse parents for private school costs. On December 31, 1986, the District Court granted summary judgment to the petitioners on their claim against the State Board and enjoined the State Board to cease interpreting state law not to allow hearing officers to order reimbursement. The State Board appealed. During the pendency of the appeal, OSERS advised Vermont that the IDEA "requires states to authorize hearing officers to decide reimbursement." *See* Petitioners' Appendix pp. 49a - 54a. The District Court's opinion was cited as consistent with this advice. Also, during the pendency of the appeal, the Asheboro City Board of Education and the petitioners settled their claim for reimbursement. On November 4, 1987, the Court of Appeals, *ex mero motu*, held that the settlement of the underlying claim for reimbursement mooted the State

Board's appeal and vacated the district court's order. In part, that decision was based on "the difficulty and sensitivity of the constitutional issue at the core of this controversy. . . ." 832 F.2d at 298. This matter, however, was remanded to the District Court for determination of the petitioners' entitlement, if any, to attorney's fees.

On July 8, 1988, the North Carolina General Assembly amended the administrative procedures for processing complaints by the parents of handicapped children set out in N.C. GEN. STAT. § 115C-116. 1987 N.C. Sess. Laws, c. 1079 (1988 Sess.). *See* Petitioners' Appendix pp. 57a - 58a. Reflecting the State Board's concern that independent hearing officers ought not have final administrative authority to order reimbursement or other relief, these amendments authorized administrative hearing officers to make a recommended decision to the State Board and authorized the State Board to make the final administrative decision. Also reflecting the *Burlington* decision, these amendments specifically authorized the State Board to order relief to parents in the form of reimbursement for private school costs, where appropriate. No authority was given to hearing officers to order any relief.

Approximately one month later (August 23, 1988), the parents petitioned the District Court for attorney's fees. They found no solace in the General Assembly's recent amendment to N.C. GEN. STAT. § 115C-116 and observed in their petition for fees that the "continuation of litigation was necessary."

In the spring of 1989, USDOE voiced objections to the General Assembly's 1988 amendment to N.C. GEN. STAT. § 115C-116 and threatened to cut off some $50 million in federal funds to North Carolina for the education of handicapped children beginning with 1990 fiscal year. USDOE's principal objection was to the General Assembly's decision to place final administrative authority in the State Board rather than in some hearing officer independent of the State Board. The State Board urged USDOE to defer any decision pending this Court's decision in a case from Pennsylvania concerning a challenge to administrative procedures similar to North Carolina's and in which North Carolina had filed an *amicus* brief supporting Pennsylvania. That case, *Dellmuth v. Muth*, 491 U.S. 223 (1989), was decided on June 15, 1989. The sole grounds for the decision was the Eleventh Amendment. Thus, the lawfulness of Pennsylvania's procedure was not reached.

After an exchange of letters with the State Board, USDOE agreed to give North Carolina until July 1, 1990 to demonstrate that its decision to confer final decision making authority on the State Board was lawful before terminating funds. On February 10, 1990, the State Board, pursuant to 5 U.S.C. § 554(e), petitioned USDOE for a declaratory ruling on this issue. USDOE declined to issue a ruling.

Faced with the potential loss of $50 million in federal funds in the midst of a budget crisis, the General Assembly, on July 28, 1990, again amended the administrative hearings process set out in N.C. GEN. STAT. § 115C-116. The title to the act reads: "An Act to Amend the Exceptional

Children's Appeals Process, to Preserve Federal Funds, and to Save the State Replacement Funds." 1989 N.C. Sess. Laws, c. 1058 (1990 Sess.). Under these amendments, final administrative authority on appeal from the recommended decisions of hearing officers was transferred from the State Board to a Review Officer. The power to enforce final administrative orders, however, remained with the State Board. *See* Petitioners' Appendix pp. 55a - 56a.

On April 2, 1991, the parties filed stipulations for purposes of adjudication of the plaintiffs' request for attorney's fees. These stipulations described the petitioners' claims against the State Board, summarized the General Assembly's amendments to the administrative hearing processes and provided a chronology. By order dated March 30, 1992, the District Court found that the petitioners were prevailing parties entitled to fees because "by virtue of [their] complaint sufficient federal pressure was brought on the State of North Carolina that Section 115C-116 was amended to comply with federal law." (Petitioners' Appendix p. 45a). A panel of the Court of Appeals for the Fourth Circuit affirmed the District Court by a divided vote reasoning that the 1986 District Court opinion "must have alerted OSERS to the State's non-complying position" and "played a major causative role in the [1987] OSERS Letter Ruling and thereby the Department of Education's [1989] policy position." *S-1 by and Through P-1 v. State Bd. of Educ.*, 6 F.3d 160, 165 (1993). The panel opinion was subsequently vacated by the Court of Appeals sitting *en banc* and the District Court decision awarding attorney's fees to petitioners was reversed.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing the writ of certiorari. The Court of Appeals sitting *en banc* held that petitioners had failed to achieve prevailing party status because a vacated judgment cannot serve as a catalyst for post-litigation events. While there may be some disagreement among the courts of appeal about the viability of the catalyst theory in light of *Farrar v. Hobby*, ___ U.S. ___, 113 S. Ct. 566 (1992), petitioners have failed to identify any disagreement among the courts of appeal about the continuing catalytic force of a dismissed lawsuit. Moreover, petitioners' claim to prevailing party status is foreclosed by this Court's holdings that the relief which forms the basis for a plaintiffs' claim to prevailing party status must directly benefit them at the time they obtained it.

Petitioners' argument that the Court should grant their writ because the Court of Appeals' decision "dramatically narrows the grounds for fee awards" is simply not well-founded. The Court of Appeals' decision in this unusual case is sound, logical and consistent with this Court's decisions.

I. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE CATALYST THEORY IS NOT SO BROAD AND EXPANSIVE AS TO PERMIT PETITIONERS TO OBTAIN PREVAILING PARTY STATUS BASED ON EVENTS OCCURRING AFTER DISMISSAL OF THEIR LAWSUIT ON THE GROUNDS OF MOOTNESS.

Petitioners argued to the Court of Appeals that the catalyst theory is so broad and expansive that they can obtain attorney's fees from respondents based on decisions made by the North Carolina General Assembly almost three years after their lawsuit was declared moot and the judgment in their favor vacated. The Court of Appeals sitting *en banc* rejected petitioners' argument and held, in light of *Farrar v. Hobby*, 113 S. Ct. 566, that "dismissal on appeal of an action under 42 U.S.C. § 1983 for prudential reasons as moot operates to vacate the judgment below [citation omitted], and prevents the plaintiffs from being found prevailing parties by virtue of post-dismissal events." *S-1 and S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (1994).

The logic of this simple proposition is clear. As Judge Wilkinson stated in his dissent from the panel opinion, subsequently adopted by the *en banc* majority:

> Plaintiffs' lawsuit lost whatever force it had as a catalyst the day it was mooted by this court. I do not understand how moot lawsuits, in which the possibility of relief against a party

> is by definition foreclosed, continues nonetheless to function as [a] catalyst for change and for the recovery of attorney's fees.

6 F.3d at 169-170.

The value of this logical principle as a limit on the amorphous catalytic theory is demonstrated by the facts of this case. Allowing petitioners' claim for attorney's fees to be pursued based on the supposed continuing catalytic force of their mooted lawsuit would, as Judge Wilkinson observed, expose respondents to liability for fees and at the same time deny respondents "their right to an appeal" and "the opportunity to refute the claims asserted against them."[1] 6 F.3d at

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[1] The fundamental claim petitioners' asserted against respondents was that the IDEA requires North Carolina to vest final administrative authority to resolve the complaints of handicapped parents in administrative hearing officers rather than in the State Board of Education, a constitutional agency given the power by the Constitution "to supervise and administer the free public school system." N.C. Const. art. II, § 5. Petitioners' claim is at odds with the express intention of Congress in establishing USDOE "to protect the rights of State and local governments . . . in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments . . . over their own educational programs and policies." 20 U.S.C. § 3403(a). Petitioners' claim is also flatly contrary to rules of statutory construction rooted in principles of federalism. *See, e.g., Penn. Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943) (intention of Congress (continued...)

169. There is, moreover, no reasonably ascertainable limit on the period of time a mooted lawsuit would continue to have catalytic force or any clear measure of the level of catalytic force a mooted lawsuit must have. Does a mooted lawsuit continue to have catalytic force for one year, two years or even three years? Must a plaintiff seeking fees based on events occurring after his lawsuit is mooted prove that his mooted suit was the sole cause of the post-litigation events, or only that his lawsuit was a contributing cause? Here, petitioners seek to hold respondents liable for attorney's fees based on legislation enacted by the North Carolina General Assembly almost three years after their claim was declared moot and they seek to hold respondents liable for attorney's fees based on legislation enacted by the North Carolina General Assembly in response to a threat by USDOE to terminate $50 million in federal funding for the education of handicapped children.

In the face of these facts, petitioners contend that the Court ought to grant their petition because the Court of Appeals' decision "dramatically narrows the grounds for fee awards," Petition p. 11, and is in conflict with the decisions of other courts of appeal. *Id.* pp. 19-22. This claim is not well-founded. None of the "conflicting" decisions cited by

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[1](...continued)
to regulate internal affairs of a state "is not lightly to be inferred and ought not to be implied"); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (Congressional intention to upset balance of power between federal and state governments must be "clear and manifest").

petitioners, and no other decision to respondents' knowledge, holds that a dismissed lawsuit has any continuing catalytic force or that post-litigation events are a sufficient basis for claiming prevailing party status. Indeed, in every case cited by petitioners the lawsuit alleged to have catalytic force was pending at the time the actions were taken by defendants which allegedly gave the plaintiffs the "relief" they sought.

In short, the decision here does not dramatically narrow the grounds for fee awards and is not in conflict with the decisions of other courts of appeal.

II. REGARDLESS OF THE CONTINUED VIABILITY OF THE CATALYST THEORY, PETITIONERS' CLAIM FOR ATTORNEY'S FEES IS FORECLOSED BY DECISIONS OF THIS COURT.

In *Farrar*, 113 S. Ct. at 573, this Court held: "Whatever relief the plaintiff secures must *directly* benefit him *at the time* of the judgment or settlement." (emphasis added) *Hewitt v. Helms*, 482 U.S. 755, 764 (1987) is cited in *Farrar* in support of this requirement. *Hewitt* establishes that this requirement applies when a plaintiff seeks attorney's fees under a catalyst theory -- assuming that theory is viable -- for relief obtained other than by a judgment, consent decree, or settlement. *Hewitt* also illustrates plaintiffs' failure to meet this requirement.

In *Hewitt*, the plaintiff, a prisoner, relied on a catalyst theory to claim prevailing party status based on an amendment to defendants' regulations which was made after his

release from prison, but during the pendency of his appeal on the merits to the Court of Appeals from an adverse decision by the District Court. 482 U.S. at 758-59. The Court rejected the plaintiffs' claim for attorney's fees without deciding whether the catalyst theory is viable. *Id.* at 763 ("We need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988 . . ."). The claim for fees was rejected because *Helms* "did not and could not get redress" from promulgation of the amendment to the regulations. *Id.* When the amendment to the regulations was made, "Helms had long since been released from prison." *Id.* By the time of the Supreme Court's decision, Helms had returned to prison and was presumably benefiting from the new regulations in some indirect manner. Nevertheless, "that fortuity" did not "render him, retroactively, 'a prevailing party'" in his lawsuit. *Id.* at 764. Thus, in *Farrar's* words, the amendment to the regulations did not "directly benefit" Helms "at the time" of the amendment, and therefore did not provide any basis for him to obtain prevailing party status.

And so it is with petitioners. The relief petitioners sought against respondents was a change in the State Board's rules to allow hearing officers to award reimbursement for private school costs. They claim they obtained that relief through 1988 and 1990 amendments by the General Assembly to the administrative procedures for reviewing complaints by parents of handicapped children. Assuming they obtained that relief through either the 1988 or 1990 statutory amendments, that relief did not directly benefit them at the time they obtained it, *i.e.*, in 1988 or 1990. By virtue of the

1987 settlement agreement between petitioners and the local defendants, the petitioners obtained full reimbursement for the private school costs they had incurred. Thereafter, they had no direct or immediate interest in the scope of powers of hearing officers. Their interest, at most, was indirect and conjectural, arising only in the event that at some point in the future they again decided unilaterally to place their children in some private school, they again decided to seek reimbursement for those costs and they again decided to seek administrative review of a decision by the local school board to deny reimbursement.

CONCLUSION

The Court of Appeals' decision is sound, logical and entirely consistent with the decisions of this Court; it is not in conflict with the decisions of other courts of appeal. Respondents therefore request the Court to deny the petition.

Respectfully submitted,

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